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In The
SUPREME COURT OF THE UNITED STATES

*

October Term 1996

GEORGE GREEN

Petitioner

vs.

PHOENIX INSTITUTE FOR RESEARCH AND EDUCATION, LTD. A Nevada Corporation

Respondent

Petition for a Writ of Certiorari to the Supreme Court of the State of Nevada

PETITION FOR A WRIT OF CERTIORARI

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57 pp

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QUESTIONS PRESENTED

I. Where a party, claiming ownership or right to gold coins, deposits the coins with the Clerk of the Court, may he be deprived of his ownership or right to the coins without being heard, or is such deprivation a violation of the due process clauses of the Fifth and Fourteenth Amendments?

II. Where the title to gold coins is being litigated, may the Court, without hearing one of the claimants, award the coins to someone who asserted no claim to the coins and who was not a party to the suit, or is such an award a violation of the due process clauses of the Fifth and Fourteenth Amendments?

LIST OF PARTIES

The names of all parties to the proceedings in the court whose judgment is sought to be reviewed here appear in the caption of the case. There is no parent or subsidiary company of any party to be listed.

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Petition for a Writ of Certiorari to the Supreme Court of the State of Nevada

PETITION FOR A WRIT OF CERTIORARI

Petitioner George Green, respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of the State of Nevada.

OPINIONS BELOW

1. The Order Dismissing Appeal and Order Denying Rehearing of the Supreme Court of the State of Nevada are reproduced in the Appendix at pages 8 ff. and 13 (hereafter App 8 ff., 13) The Judgment of the Ninth Judicial District Court is reproduced at App 1 ff., 4 ff.

STATEMENT OF JURISDICTION

2. The Nevada Supreme Court entered its Order Dismissing Appeal on January 4, 1996 (App 8 ff.), and its Order denying the Petition for Rehearing on May 3, 1996 (App 13). On July 22, 1996, Justice O'Connor extended the time for filing this petition for certiorari to and including September 3, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254 (1).

CONSTITUTIONAL AND OTHER PROVISIONS INVOLVED

3. The pertinent provisions of the Constitution of the United States of America are set forth below:

[Article V of Amendment]

"No person shall. . . be deprived of life, liberty, or property, without

due process of law:

> [Article XIV of Amendment]
>
> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law;

Other Provisions.

4. This Court's decisions relating to indispensable parties are applied in cases of the United States Court of Appeals for the Ninth Circuit but not by the Supreme Court of Nevada in the ruling for which certiorari is sought.

STATEMENT OF THE CASE

5. In 1991, David Overton (hereafter Overton) sent 4 packages of gold coins to George Green. The coins were to be used in paying the publishing expenses of certain works supplied by Plaintiff Phoenix Institute for Research and Education, Ltd. (hereafter Phoenix). Green was publishing the works and Overton wished to support their publication. The packages were intended as a gift (App. 15-18). As a result of receiving the coins, Green made further expenditures that more than equaled the value of the coins. After the money was spent, Phoenix contended that the coins should not have been sent to Green, but to Phoenix, and sued Green for the coins. Green deposited the coins in court, and at trial, Phoenix's claims were all dismissed. (No appeal was take from this dismissal.)

6. On October 6, 1994, after Phoenix had rested its case, defendant Green began to present his case and was in the process of identifying exhibits with his first witness when the trial judge, sua sponte, terminated the proceedings, as to both parties, stating:

"THE COURT: I have some announcements

to make, I have reviewed the evidence that has been offered to this point. . .I have made a determination that I must intervene sua sponte at this point in this case and dismiss all claims of the plaintiff for reasons that I will describe herein. This case is holding the Court system up to ridicule. I will not have that. This is a case by a group of swindlers against another swindler in my opinion. The parties to this case have perverted the corporate laws of the State of Nevada and probably more importantly not probably but more importantly they have perverted the Gospel of Jesus Christ and I won't have that happen in this Courtroom. . .

There is but one just result in this case and it's probably not very just either but it's as close as I can come to justice in this case. It will be the order that the gift failed. It was not completed; that the gold is being held by these parties in constructive trust for the donor. It will be ordered returned to him forthwith.

I hope that Mr. Overton is wise enough to read the real Revelation of Christ which says that if anybody adds to this book or detracts from it that they will suffer the consequences. I hope he decides to give it to someone who tells him the truth but whatever he decides to do with it would be his choice.

This case is ordered terminated at this point. . ." App. 1-3).

7. A formal Order was entered October 7, 1994, (App. 6).

8. After Green's case was dismissed On October 6, 1994, Green filed a Motion to Alter or Amend the Order Dismissing Action on October 10, 1994, and an Amended and Supplemental Motion to Alter or Amend Order Dismissing Action on October 10, 1994 (App.14). Green's Reply to Opposition to Motion and Amended and Supplemental Motion to Alter or Amend Order Dismissing Action was filed October 24, 1994 (App. 17). The Motion to Alter or Amend was denied November 1, 1994 (App. 6), as was a Motion for Stay pending appeal.[1] On November 9, 1994, Green filed his Supplemental Notice of Appeal to the November 1 Order Denying Motion to Alter or Amend Order Dismissing Action (App. 7), and on January 4, 1996, the Nevada Supreme Court entered its Order Dismissing Appeal (App. 8). Rehearing was denied on May 3, 1996, (App. 13).

---

[1] The Nevada Supreme Court thereupon ordered a stay on November 1, 1994.

How the Federal Questions Were Presented.

9. The failure and refusal to hear Green's case was not apparent until the trial court stopped the proceedings on October 6, 1994. Therefore, it was in Green's Motion to Alter or Amend the Order Dismissing Action, as amended (App. 14), and his Reply to Opposition to Motion and Amended and Supplemental Motion to Alter or Amend Order Dismissing Action (App. 19) that Green asserted that he was denied due process by being deprived of the coins without being heard and without an indispensable party being present.

10. Green cited, inter alia, Shields v. Barrow (1854) 17 How. 130 15 L.Ed. 158 to show that all indispensable parties must be before the court to make a valid decision, and cited Rule 19 (a) of FRCP and the corresponding provision of the Nevada Rules of Civil Procedure (NRCP) both derived from the principle outlined in Shields. Green also cited several Ninth Circuit cases to show how Shields had theretofore been applied. Chicago M. St. Paul & P.R. Co. v. Adams Co. (1934) (C.C.A. 9th), 72 F2d 819, 820, 821, State of Washington v. United States (1936) (C.C.A. 9th) 87 F2d 421, and Delno v.

Market Street Railway Company (1942) (C.C.A. 9th) 124 F2d 965 applied the rule requiring the presence of indispensable parties set forth in Shields both before and after FRCP 19 was adopted.

11. In the Nevada Supreme Court, Green cited the same authorities and asserted the same arguments.

REASONS FOR GRANTING THE WRIT

I.

Where a party, claiming ownership or right to gold coins, deposits the coins with the Clerk of the Court, he may not be deprived of his ownership or right without being heard because such deprivation is a violation of the due process clauses of the Fifth and Fourteenth Amendments.

12. Few, if any, rights are more important than the right to be heard in litigation where one's rights are being litigated. The right to be heard is an elemental part of due process. Without the right to be heard, there is no due process.

13. The Fifth and Fourteenth Amendments to the Constitution of the United States clearly provide for due process of law. All officeholders, both state and federal, are bound to this requirement. To allow this right to be violated undermines the foundation of both the Constitution and the society that is based upon it.

14. Due process requires an opportunity to be heard (Memphis Light, Gas and Water Division v. Craft, Tenn, 1978, 98 S.Ct. 1554, 436 US 1, 56 L.Ed.2d 30, Wolff v. McDonnell, Neb. 1974, 94 S.Ct. 2963, 418 US 539, 41 L.Ed.2d 935, Board of Regents of State Colleges v. Roth, Wis. 1972, 92 S.Ct. 2701, 408 US 564, 33 L.Ed.2d 548. Boddie v. Connecticut, Conn. 1971, 91 S.Ct. 780, 401 US 371, 28 L.Ed.2d 113). And this opportunity is not afforded when a party is cut off before he begins.

15. These principles have been recognized from time immemorial:

> "CAP. XXIX. No freeman shall be taken, or imprisoned, or be disseised of his freehold, or liberties, or free customs or be outlawed or exiled, or any otherwise destroyed; nor will we not pass upon him, nor condemn him, but by lawful judgment of his peers,

or by the law of the land. We will sell to no man, we will not deny or defer to any man either justice or right.". . .

"But by the law of the land. For the true sense and exposition of these words, see the statute of 37 E. 3. cap. 8, where the words, by the law of the land, are rendred without due process of law. . .this chapter is but declaratory of the old law of England." Coke's "Institutes of the Laws of England" 1797 edition, Vol. II, 1974 reprint, Omni Publications 45, 50):

16. The same conclusion, that "due process of law" and "the Law of the land" are synonymous, is found in decisions of this Court, e.g. Murray v. Hoboken Land, etc., Co., N.J. 1856, 59 US 276, 18 How. 276,, 15 L.Ed. 372, and Ochoa v. Herandez y Morales, Puerto Rico, 1913, 33 S.Ct. 1033, 230 US 139, 57 L.Ed. 1427.

17. Due process implies a hearing before adjudication affecting an interested party's rights Thompson v. Auditor General, 247 NW 360, 371, 261 Mich. 624, In re Auditor General 266 NW 464, 467, 275 Mich 462, 107 ALR 279.

18. Defendant Green had possession and legal title to the gold. He was induced to make large expenditures on the basis of having the gold. He "changed

position" as a result of it.

19. George Green had several bases for claiming the gold and was entitled to be heard on his case.

20. George Green was not permitted to put on his case. He was deprived of all property interest in the gold without being heard.

21. He was deprived of that property without due process of law.

22. The trial Court exceeded its jurisdiction by making disposition of property without due process.

23. Such a ruling should have been set aside. (McShan v. Sherill, 283 F2d 462 [C.C.A.9, 1960]). See also Persing v. Reno Stock Brokerage Co. 30 Nev 342, 96 P 1054 (1908) (void ab initio): Wright v. Cradlebaugh 3 Nev. 310; State v. Forquette, 67 Nev. 505, 221 P2d 404.

24. Two violations of Green's right to due process are present in this case. When Green was blocked from presenting his case, he was deprived of due process by being denied the right to be heard.

II.

Where the title to gold coins is being litigated, a Court, without hearing one of the claimants, may not award the coins to a someone who asserted no claim to the coins and who was not a party to the suit, because such an award is a violation of the due process clauses of the Fifth and Fourteenth Amendments.

25. The second violation of due process occurred when the trial judge constructed an entirely new case from the one being litigated, and this new case required the presence of a party who was not before the court, who was not required to state the basis of his claim, be examined with regard to that claim and be bound by any result. This court has described this requirement as the need to have all indispensable parties before the court. Shields v. Barrow (1854) 17 How. 130 15 L.Ed. 158.

26. Shields holds that the absence of an indispensable party deprives the court of jurisdiction to render a decision. This conclusion is based, at least in part, on the fact that if an indispensable party is absent, the court cannot know the facts that would be brought to bear by that party's presence and his submission to discovery and examination under oath with regard to his claim.

27. This Court decided 140 years ago that before a court may render a judgment, all indispensable parties must be made parties to the action. If any are omitted, the suit must be dismissed for want of indispensable parties, and no judgment may be rendered therein.

28. In Shields v. Barrow, (1854), 17 How. 130, 15 L.Ed. 158 the Court said:

> "For, if only a part of those interested in the contract are before the court, a decree of rescission must either destroy the rights of those who are absent, or leave the contract in full force as respects them; while it is set aside, and the contracting parties restored to their former condition as to the others. We do not say that no case can arise in which this may be done; but it must be a case in which the rights of those before the court are completely separable from the rights of those absent, otherwise the latter are indispensable parties. * * *
> "A circuit court can make no decree affecting the rights of an absent person, and can make no decree between the parties before it, which so far involves or depends upon the rights of an absent person, that complete and final justice cannot be done between the parties to the suit without affecting those rights. * * *

"Thomas R. Shields, and his other five indorsers, had such a direct and immediate interest in the contract of compromise, and that interest was so entire and undivisible, that without their presence, no decree on the subject could be made." Shields v. Barrow, 17 How. 130, 15 L.Ed. 158, 160, 161.[2]

29. This rule has stood the test of time and has been crystallized into Rule 19(a) of the Federal Rules of Civil Procedure which provides:

"Necessary Joinder. Subject to the provisions of Rule 23 and of subdivision (b) of this rule, persons having a joint interest shall be made parties and be joined on the same side as plaintiffs or defendants. When a person who should join as a plaintiff refuses to do so, he may be made a defendant or, in proper cases an involuntary plaintiff."

---

[2] In Shields only part of the interested parties were before the court. In the instant case the party who received the gold was not a party to the suit, and benefitted from the Court's ruling without having pleaded his case, without having been subject to the Court's process and the other party's discovery, and without having to meet or overcome any defense.

30. NRCP 19(a) contains similar language.

31. This rule has been interpreted by the Ninth Circuit Court of Appeals at least three times.

32. In Chicago V. St. Paul & P.R. Co. v. Adams County (1934), 72 F2d 816, the Court said:

> "The subject of indispensable or 'essential' parties is further elaborated in Minnesota v. Northern Securities Co., 184 U.S. 199, 235, 22 S.Ct. 308, 46 L.Ed. 499:
>
> "'* * * We think that the suit is defective for want of essential parties whose rights would be vitally affected by the relief sought therein.
>
> "'The general rule in equity is that all persons materially interested, either legally or beneficially, in the subject matter of a suit, are to be made parties to it, so that there may be a complete decree, which shall bind them all. By this means the court is enabled to make a complete decree between the parties to prevent future litigation, by taking away the necessity of a multiplicity of suits, and to make it perfectly certain that no injustice is done, either to the parties before it, or to others who are interested in the subject matter, by a decree which might otherwise be granted upon a

partial view only of the real merits. When all of the parties are before the court, the whole case may be seen; but it may not, where all the conflicting interests are not brought out upon the pleadings by the original parties thereto. Story, Eq. Pl. Sec 372.

"' The established practice of courts of equity to dismiss the plaintiff's bill if it appears that to grant the relief prayed for would injuriously affect persons materially interested in the subject matter who are not made parties to the suit is founded upon clear reasons, and may be enforced by the court, sua sponte, though not raised by the pleadings or suggested by the counsel.' * * *

"But the appellant insists that the question 'is as to whether the county treasurers have rights and interests in the taxes which may be injuriously affected by the decree entered in the district court,' and that the county treasurer 'has no beneficial interest in the amount of the collections.' We believe that the appellant is here in error; for counsel seem to overlook the fact that, under the rule announced in the Northern Securities Case, quoted supra, an indispensable party may have merely a <u>legal</u>, as contradistinguished from a <u>beneficial</u>, interest. And, assuredly, a county treasurer has a legal interest in the question of whether or not a court will order him to refrain from performing a duty apparently prescribed by statute.

"Nor is it necessary that the

officer's rights be 'injuriously affected' by the court's decree. In Davis v. Henry (C.C.A. 6), 266 F. 266, the court said: 'the test of indispensability is not whether the decree is bound to injuriously affect the rights of the absent party, it is enough that such absence may "leave the controversy in such a situation that the final determination may be inconsistent with equity and good conscience."'

"In the instant case, however, the county treasurers have not appeared during any stage of the proceedings, either specially or generally. They have not 'fully presented their contentions of law and fact,' either in the court below or on this appeal. They have not 'had their day in court.' There is therefore in this case much greater reason for holding that a decree without the joinder of the county treasurers as parties defendant leaves 'the controversy in such a situation that its final determination may be inconsistent with equity and good conscience.'"

Chicago M. St. Paul & P.R. Co. v. Adams Co. (1934) (C.C.A. 9th), 72 F2d 819, 820, 821, emphasis in original.

33. Again, in State of Washington v. United States (1936) (C.C.A. 9th) 87 F2d 421, that Court said:

"Under the rules quoted, we have seen that if a party falls within the classification of 'formal parties'

then there is no error in the nonjoinder of such parties. We know of no exceptions this rule. With respect to those who fall within the classification of 'necessary' parties, the nonjoinder of such parties is error, unless such parties come within one of the several exceptions to the rule. With respect to those who fall within the classification of 'indispensable' parties, the nonjoinder of such parties is error, and to this rule we understand there are no exceptions, except where the parties are too numerous, when a special rule may be invoked. * * *

"There are many adjudicated cases in which expressions are made with respect to tests used to determine whether an absent party is a necessary party or an indispensable party. From these authorities it appears that the absent party must be interested in the controversy. After first determining that such party is interested in the controversy, the court must make a determination of the following questions applied to the particular case: (1) Is the interest of the absent party distinct and severable? (2) In the absence of such party, can the court render justice between the parties before it? (3) Will the decree made, in the absence of such party, have no injurious effect on the interest of such absent party? (4) Will the final determination, in the absence of such party, be consistent with equity and good conscience?

"If, after the court determines

that an absent party is interested in the controversy, it finds that all of the four questions outlined above are answered in the affirmative with respect to the absent party's interest, then such absent party is a necessary party. However, if any one of the four questions is answered in the negative, then the absent party is indispensable. * * *

"On the other hand, the nonjoinder of an indispensable party is fatal error, and the court cannot proceed to a decree in the absence of such indispensable party, notwithstanding the fact that the joinder would oust the court of jurisdiction. Neither the statute nor the equity rule, quoted above, permit the court to proceed in the absence of an indispensable party. * * *

"We conclude that the states are without remedy to litigate title to the island against the United States, and therefore the orders denying intervention to the states were final orders and appealable. We further conclude in reviewing the action of the court in disposing of the rights of the states to intervene, that the court erred in denying leave to intervene for the following reasons (1) That the states are without remedy to litigate title to the subject of the suit if intervention is denied; (2) that each state claims 'an interest in the litigation.' And (3) that the intervention will 'be in subordination to, and in recognition of, the propriety of the main

proceeding,' under either construction of that language. Because of these reasons, the states have shown an absolute right to intervene, and the trial court had no discretion in regard thereto."

State of Washington v. United States (1936) (C.C.A. 9th), 87 F2d 421, 427, 428, 435.

34. In Delno v. Market Street Railway Company (1942) (C.C.A. 9th) 124 F2d 965, which was decided after the adoption of Rule 19(a) of the Federal Rules of Civil Procedure, the Ninth Circuit sustained a denial of declaratory relief because interested parties had not been joined. The Court said:

"The controversy here is actually between the holders of the bonds who had agreed to the extension of April 1, 1940, and appellant. Appellant seeks to have the lien of his bonds declared to be superior to the lien of the bonds the owners of which agreed to the extension. He further seeks a declaration that the trustee had certain duties which were breached, but the existence and alleged breach of such duties is entirely dependent on the outcome of the controversy between appellant and the bondholders who agreed to the extension. In other words the whole basis of the action is the controversy between the two classes of bondholders mentioned, yet the bondholders who agreed to the

extension are not made parties to the action.

"In Borchard, Declaratory Judgments, 2d Ed., 299, it is said: 'The uncertainty would not be terminated where the proceedings indicate the absence or failure to join necessary parties in interest who ought to be heard or bound.' The note to Rule 57, Federal Rules of Civil Procedure, Rule 19(a), requires parties having a 'joint interest' to be joined in an action, which means 'those who were necessary or indispensable parties under the previous practice.' 2 Moore's Federal Practice 2142, Sec. 1902. We need not decide whether or not the court below could have proceeded to render judgment here, in the absence of the bondholders who had agreed to the extension, on the ground they were either indispensable or necessary parties. * * *

"Appellant seeks to have his rights as a bondholder declared to be superior to the rights of other bondholders. All bonds were issued pursuant to the same trust instrument and were of the same priority. It would seem that he seeks to have the courts adjudicate directly on the rights of the absent bondholders. However, it is apparent that any judgment rendered would not bind the absent bondholders, and appellant makes no assertion that it would do so. While such a judgment might terminate the issue between the parties now before it, it would not

finally settle the issue because the absent bondholders would have the right to litigate the same question. The judgment, therefore, would not meet either criteria guiding the policy in favor of rendering declaratory judgments. It would not serve a useful purpose in clarifying and settling the issue as to priority of the bonds, because the issue would not be finally settled."

Delno v. Market Street Railway Company (1942) (C.C.A. 9th), 124 F2d 965, 968, 969.

35. The objection that indispensable parties have not been joined is not waived, evenn by failure to urge it in the lower Court. Here, it was raised in the trial court, but it may be raised for the first time on appeal.

36. In Flynn v. Brooks (1939) (C.A.D.C.) 105 F2d 766, the Court said:

"The defect of parties suggested in the first question was apparently not raised below. Notwithstanding this, we think it is our duty to notice it. In Hooey et al. v. Wilson, 9 Wall., 501, 19 L.Ed. 762, it was held to be the duty of the appellate court, even where the point was not made in the court below, to reverse and remand a case where indispensable parties are missing. That the insurance company is an indispensable party cannot, we think, be seriously doubted, for it is obvious that the relief asked--the

cancellation of the assignment to it--cannot be given without permanently affecting its rights and interests. In Shields v. Barrow, 17 How. 130, 15 L.Ed.158, the Supreme Court held that any person having an interest in the controversy of such a nature that a final decree cannot be made without affecting that interest is an indispensable party. * * *

"With respect to the prayer for cancellation of the assignment, we think the court should, sua sponte, have required the bill to be amended, or have dismissed it if the amendment were not made."

Flynn v. Brooks (1939) (C.A.D.C.), 105 F2d 766, 767, 768.

37. In Shields v. Barrow, 17 How. 130, 15 L.Ed. 158, even though the question of indispensable parties was not determined until after 13 years of litigation the Court nevertheless remanded the case, and ordered it dismissed. The Court said:

"This court regrets that a litigation, which has now lasted upwards of 13 years, should have proved wholly fruitless; but it is under the necessity of reversing the decree of the Circuit Court, ordering the cause to be remanded, and the original and cross bills dismissed."

Shields v. Barrow, 17 How. 130, 15 L.Ed. 158, 163.

38. To permit a disposition of a case both without an indispensable party and without affording one of the present parties a hearing undermines the principles of due process.

39. If permitted to stand, this case will serve as precedent for adjudicating rights without the parties being present who are necessary to give the court jurisdiction and without hearing evidence from the parties before the court.

40. This disposition varies from the decisions of this Court and the practice in various jurisdictions. Thus, under Ninth Circuit decisions applying Shields, parties in the Ninth Circuit may be assured of not being litigated without indispensable parties being present--except (now) in Nevada.

CONCLUSION

41. "(A)nd it is the worst oppression that is done by colour of justice." (Coke's Institutes, Vol. II, p. 48).

Respectfully submitted this 29th day of August, 1996.

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(702) 883-1966

By George W. Abbott

Attorneys for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Petition for Writ of Certiorari were mailed, postage prepaid, this 29th day of August, 1996, to BRADLEY PAUL ELLEY, ESQ., Attorney at Law, 120 Country Club Drive, Incline Village NV 89541, Attorney for Respondent Phoenix Institute for Research and Education, Inc.

David Horton
David Horton

APPENDIX

Dept. 1
No. 29507

FILED
Oct. 6, 1994

IN THE NINTH JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA

BEFORE THE HONORABLE DAVID GAMBLE,
DISTRICT JUDGE

PHOENIX INSTITUTE for Research and Education, Ltd., a Nevada Corporation
vs.
GEORGE W. GREEN, et al.,

October 6, 1994

APPEARANCES:

For the Plaintiff: John Aebi,
Attorney at Law

For the Defendant: David Horton,
Attorney at Law

Reported by Joan Wilder, CSR 41

THE COURT: I have some announcements to make. I have reviewed the evidence that has been offered to this point and I have at long last discovered the complaint by which we are operating in this case or under which we are operating. I have reviewed the claims there. There are no remaining claims by the defendant to the res of this case, which is the gold that is in deposit with the Court.

I have made a determination that I must intervene sua sponte at this point in this case and dismiss all claims of the plaintiff for reasons that I will describe herein. This case is holding the Court system up to ridicule. I will not have that. This is a case by a group of swindlers against another swindler in my opinion. The parties to this case have perverted the corporate laws of the State of Nevada and probably more importantly not probably but more importantly they have perverted the Gospel of Jesus Christ and I won't have that happen in this Courtroom. There has been no proof of a completed gift, therefore, the claims in the first claim for relief must fail. The second claim for relief must fail. The third claim for relief, conversion of checks, there has been no evidence whatsoever on, therefore, it's ordered dismissed. The fourth claim for relief fails by virtue of the plaintiff having failed to sustain its burden of proof.

The fifth claim for relief fails for this reason: That's the one for interference with present and prospective economic advantage. I don't believe that the laws of the State of Nevada would protect anyone who is seeking unfair economic advantage over potential donors such as I have seen in this case. I don't think that there was any intent by--there is any intent in our law to protect such an economic act.

The 6 claim for relief is --there has been no evidence on.

The seventh claim for relief unjust enrichment does not apply in this case because Mr. Green is no more entitled to this gold that is the Phoenix Institute. The eighth claim for relief, injunctive relief fails for the same reason as the interference with prospective business advantage claim.

There is but one just result in this case and it's probably not very just either but it's as close as I can come to justice in this case. It will be the order that the gift failed. It was not completed; that the gold is being held by these parties in constructive trust for the donor. It will be ordered returned to him forthwith.

I hope that Mr. Overton is wise enough to read the real Revelation of Christ which says if anybody adds to this book or detracts from it that they will suffer the consequences. I hope he decides to give it to someone who tells him the truth but whatever he decides to do with it it would be his choice.

This case is ordered terminated at this point. Are there any questions?

# # #

(Reporter's certification)

(Caption of case)

FILED: Oct. 7, 1994

O R D E R

This case having come before the Court for a bench trial on October 3, 1994, through October 6, 1994, and the Court having considered all of the pleadings and papers on file herein, the testimony of witnesses, and all the exhibits admitted at trial, and good cause appearing, makes the following Orders:

Following the conclusion of the Plaintiff's case, the Court, sua sponte, dismissed all of the plaintiff's causes of action pursuant to NRCP 41(b) and in the interests of judicial economy. Defendant George Green has no pending claims in this case and, therefore, dismissal of the entire case is appropriate in light of the following findings of the Court.

The Court finds that there has been no proof of a completed gift of the gold coins to the Phoenix Institute. Additionally, the Court finds no proof whatsoever of a gift to George Green. Therefore, the first, second and fourth claims for relief must fail. The Court also finds that there has been no credible evidence presented on the third and sixth claims and therefore they must also fail. The Court finds that the seventh claim for relief also fails because the Phoenix Institute is no more entitled to the gold that is George

Green.

The claims for interference with present and prospective economic advantage (Count V) and injunctive relief (Count VIII) are dismissed for the following additional reasons. The Court believes and finds that the parties to this case have no right to use the Court system and corporate laws of the State of Nevada as a means to bilk innocent people. Neither party is entitled to any benefit or protection from this Court due to the nature of their own actions.

The Court finds that the gift was never delivered, and thus was not completed. The gold has been held in constructive trust for the donor, David Overton, and is ordered returned to him. The Court will continue to hold the gold until Mr. Overton is able to take possession of it.

IT IS THEREFORE ORDERED that Plaintiff's First Amended Complaint is DISMISSED in its entirety.

It is further ordered that the gold coins currently on deposit with the Court be returned to David Overton.

Dated this 7 day of October, 1994.

/s/ David R. Gamble
District Judge

(Caption of case)

FILED: Nov. 1, 1994

ORDER DENYING MOTION TO ALTER OR AMEND ORDER DISMISSING ACTION

The Court, having reviewed Defendant's "Motion to Alter or Amend Order Dismissing Action," Defendant's Motion and Points and Authorities in Support of Motion to Alter or Amend Order Dismissing Action," Plaintiff's Opposition thereto, and related documents,

IT IS ORDERED that Defendant's Motion is denied.

DATED this 1st day of Nov. 1994.

/s/ David R. Gamble
District Judge

(Caption of case)

FILED: Nov. 9, 1994

SUPPLEMENTAL NOTICE OF APPEAL

TO: PLAINTIFF ABOVE NAMED, TO LEON FORT AND TO AEBI & McCARTHY, and DAY R. WILLIAMS, ESQ., 1300 Curry Street, Carson City, Nevada 89703 and GEORGE ABBOTT, 1098 Airport Road, Box 98, Minden, Nevada 89423, their attorneys:

PLEASE TAKE NOTICE that Defendant George Green hereby appeals to the Supreme Court of Nevada from that certain Order Denying Motion to Alter or Amend Order Dismissing Action, entered herein on November 1, 1994. This appeal is taken as to both law and fact and to the whole thereof.

DATED: This 9th day of November, 1994.

/s/ David Horton
David Horton
(address)

(Certificate of Service)

IN THE SUPREME COURT OF THE
STATE OF NEVADA

GEORGE GREEN,	)	
	)	
Appellant	)	No. 26286
	)	
vs.	)	FILED
	)	Jan. 04 1996
PHOENIX INSTITUTE FOR RESEARCH AND EDUCATION, A NEVADA CORPORATION	)	
	)	
Respondent	)	

ORDER DISMISSING APPEAL

This is an appeal from an order of the district court dismissing respondent's complaint. During 1991, appellant George Green ("Green") received four shipments of gold coins from David Overton ("Overton") which were meant to be donated to respondent Phoenix Institute for Research and Education, a Nevada corporation ("Phoenix"). Overton donated the gold coins to Phoenix in order to assist Phoenix in publishing some of its publications. Green, representing himself to Overton as an officer or trustee of Phoenix, did not deliver the gold coins to Phoenix. Instead, after moving to Gardnerville, Nevada, Green hid some of the gold coins in his home and buried the remainder of the gold coins in his back yard.

After verifying the nature of the gift

from Overton, Phoenix filed its original complaint against Green which contained seven claims for relief. Green filed a counterclaim that was dismissed several months before trial. Trial began on October 3, 1994. On October 6, 1994, after Phoenix had rested its case, the district court dismissed Phoenix's complaint sua sponte and awarded the gold coins to Overton.

Green appeals, arguing that (1) the district court erred in ordering the gold coins returned to Overton without conducting a hearing; (2) the district court erred in awarding the gold coins to an indispensable party that was not joined in the action; (3) the district court erred in awarding the gold coins to Overton in light of the doctrine of in pari delicto potior est condition defendentis; and (4) Overton's gift of the gold coins to Green divested Overton of title to the coins.

Phoenix requests that this Court should award Phoenix costs and attorney's fees associated with this appeal. Also, Phoenix contends that Green's appeal should be dismissed because Green lacks aggrieved party status, as required by NRAP 3A(a).

As a preliminary matter, we conclude that Green did not lack aggrieved party status as alleged by Phoenix in its motion to dismiss. We conclude that Green, in his capacity as the constructive trustee of the gold coins, has standing to appeal the district

court's termination of his legal rights to the gold coins. NRAP 3A(a).

We conclude that the district court did not err by returning the gold coins to Overton without conducting a hearing. In dismissing Phoenix's causes of action, the district court found that Green had been holding the gold coins in constructive trust for Overton. This court has stated that "[a] constructive trust is a remedial device by which the holder of legal title to property is held to be a trustee of that property for the benefit of another who in good conscience is entitled to it." Locken v. Locken, 98 Nev. 369, 372, 650 P2d 803, 804-05 (1982). In the interests of effectuating justice, we do not deem it necessary to conduct a hearing in order to return property to a constructive trustor. See id. at 372, 650 P2d at 805.

Pursuant to NRCP 19(a), we conclude that Overton was not an indispensable party to this action. Also, we conclude that the district court may fashion a constructive trust for the benefit of a non-party. Howard v. Dallio, 815 P2d 1150, 1152 (Mont. 1991); see also 76 Am. Jur. 2D Trusts sec. 215 (1992). The creation of a constructive trust in the present case was necessary in order to avoid an inequitable result. See Locken, 98 Nev. at 372, 650 P.2d at 805.

We conclude that the doctrine of in pari delicto potior est conditio defendentis is not applicable in the present case because Green and Phoenix

were not equally at fault. ; See, e.g., Evans v. Cameron, 360 N.W.2d 25, 28 (Wis. 1985) (concluding that in a case of equal fault, the position of the defendant is stronger).

We conclude that Overton did not divest title to the gold coins when he delivered them to Green. Overton testified that he intended to gift the gold coins to Phoenix, not to Green. This court has asserted that delivery of a gift is complete only when the intended donee has "exclusive dominion and control" over the gift. Edmonds v. Perry, 62 Nev. 41, 60, 140 P 2d 566, 575 (1943). We conclude that the district court appropriately found that the gifted gold coins were never delivered to the intended donee, Phoenix. Also, the gift was never fully consummated because Phoenix was never in "exclusive dominion and control" of the coins. Consequently, the district Court fittingly returned the gold coins to the donor, Overton.

Pursuant to NRAP 38, we conclude that Phoenix is not entitled to costs and attorney's fees associated with this appeal. Green's contentions on appeal are not "so lacking in merit as to constitute a frivolous appeal and a misuse of the appellate processes of this court." Works v. Kuhn, 103 Nev. 65, 69, 732 P.2d 1373, 1376 (1987).

After thoroughly examining the substantive plausibility of all Green's arguments on appeal, we conclude that Green's arguments lack merit.

Accordingly, we
ORDER this appeal dismissed.

s/s Steffen, C.J.
Young, J.
Springer, J.
Shearing, J.
Rose, J.

cc: # # #

IN THE SUPREME COURT OF THE
STATE OF NEVADA

GEORGE GREEN,	)	
	)	
Appellant	)	No. 26286
	)	
vs.	)	FILED
	)	May. 03 1996
PHOENIX INSTITUTE FOR RESEARCH AND EDUCATION, A NEVADA CORPORATION	)	
	)	
Respondent	)	

ORDER DENYING REHEARING

Rehearing denied. NRAP 40(c).

It is so ORDERED.

s/s Steffen, C.J.
Young, J.
Springer, J.
Shearing, J.
Rose, J.

cc: # # #

Dept. 1
No. 29507

FILED
Oct. 14, 1994

IN THE NINTH JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA

PHOENIX INSTITUTE for Research and Education, Ltd., a Nevada Corporation
vs.
GEORGE W. GREEN, et al.,
/

AMENDED AND SUPPLEMENTAL MOTION AND POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO ALTER OR AMEND ORDER DISMISSING ACTION(Oral argument requested)

# # #

I

DISMISSAL OF THE DEFENDANT'S CASE WAS WITHOUT AUTHORITY

1. There is a procedure under the Rules to dismiss a plaintiff's action after he has presented it if it shows no grounds for relief (NRCP Rule 41 (b)). Such a dismissal is after the party has been heard. There is no corresponding procedure for dismissing a defendant before he has completed the presentation of his case.

2. Defendant was in the midst of presenting his first witness on his case in chief when the cause was thrown out. There is no rule or principle of law that supports the dismissal of a case without the defendant being heard.

# # #

III

IF THE GIFT OF DAVE OVERTON OF THE GOLD IS TO BE SET ASIDE, HE IS AN INDISPENSABLE PARTY TO THE PROCEEDINGS

11. The Order or Judgment directed to be entered at the hearing on October 6, 1994, disposed of the gold to a person who was not a party to the action. If this disposition of the property was the correct disposition, Dave Overton was an indispensable party to the action, and his absence bars the Court from lawfully granting the relief given. (NRCP 17 (a), 19 (b)).

IV

THE DONATIVE INTENT OF DAVE OVERTON IS UNMISTAKABLE AND DEPRIVES HIM OF ANY INTEREST IN THE GOLD COINS

12. The testimony of Dave Overton at

his deposition shows what happened with the gold coins:

Q: . . .was your aim, Mr. Overton, not to make an investment but to make a gift?

A: Yes. My aim was to make a gift. (Overton deposition p. 21, lines 19-21 [hereafter 21/19-21].)

Q: . . .was your aim at this time to make a gift?

A: Yes. (Overton deposition 24/11-13.)

13. The delivery of the coins was completed:

Q: . . .With regards to the four shipments of gold coins, Mr. Overton, did you intend those four shipments to be gifts?

A: Yes. (Overton deposition, 54/4-7.)

Q: . . .As I understand it, you sent four shipments of gold; is that correct?

A: Yes.

Q: Were all four of those shipments sent to Mr. Green?

A: Yes.

Q: They were not sent to anyone else?

A: Correct." (Overton deposition, 58/9-16.)

14. Months after the gold was sent to

Mr. Green, Mr. Overton learned that the gold coins were still around:

Q: Now, when did you first become aware that this gold that you had sent to Mr. Green in 1991 was still around?

A: About a month ago from this date, February of 1993.

Q: How did you learn it. From whom did you learn it?

A: I believe Mr. Ekker phoned me. (Overton Deposition, 59/24-60/6.)

Q: Now, when was your first communication that you had from E.J. Ekker concerning the gold? Was that what you referred to as having happened roughly a month ago?

A: Yes.

Q: Okay. And you say that that was a telephone conversation?

A: Yes.

Q: Do you remember what Mr. Ekker told you at this time?

A: Explicitly, no, except. . .that he said George Green has or had the gold and it has not been used yet. . ." (Overton Deposition, 69/17-70/5)

Q: And had you heard anything about the gold prior to Mr. Ekker's call since the time that you had sent it to Mr.

Green?

A: No. (Overton Deposition, 71/8-11.)

15. This information surprised Mr. Overton, who thought it had been used for its intended purposes of publishing the Journals and Liberator:

Q: Now, prior to February of this year, were you surprised to learn, or around February, that the gold was still intact?

A: Yes.

Q: You thought it had been used up by then?

A: I assumed it was.

Q: And so when Mr. Ekker called you and said it hadn't been used up, that surprised you?

A: Yes.

Q: Now, had there been in the intervening time publications of Journals and Liberators?

A: Oh, yes.

Q: And hadn't you distributed some of those?

A: Yes.

Q: And was it your understanding up to February that you had supplied gifts that helped to do that?

A: Yes. (Overton deposition, 107/4-21.) # # #

(Case heading) FILED: Oct 24, 1994

REPLY TO OPPOSITION TO MOTION AND AMENDED AND SUPPLEMENTAL MOTION AND POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO ALTER OR AMENDORDER DISMISSING ACTION (Oral argument requested)

1. Plaintiff's "Opposition to Motion to Alter or Amend Order Dismissing Action" contains an admission that is dispositive of Defendant Green's Motion and Amended and Supplemental Motion to Alter or Amend Order Dismissing Action. The admission shows that the Motion should be granted under the requirements of the applicable law.

2. That admission appears on page 6, lines 12-14 of Plaintiff's Opposition: "The holder of legal title to the property in the instant case was Defendant Green." The admission shows that an indispensable party was absent.

3. The same admission further shows that Defendant Green is entitled to relief because he was not heard and was therefore denied due process.

# # #

III

DUE PROCESS WAS DENIED DEFENDANT GREEN

28. Due process implies a hearing before adjudication affecting an interested party's rights Thompson v. Auditor General, 247 NW 360, 371, 261 Mich. 624, In re Auditor General 266 NW 464, 467, 275 Mich 462, 107 ALR 279.

# # #

31. George Green was not permitted to put on his case. He was deprived of all property interest in the gold without being heard.

IN THE SUPREME COURT OF THE
STATE OF NEVADA

GEORGE GREEN	)	FILED Feb 17 1995
	)	
	)	
Appellant	)	Case No. 26286
	)	
vs	)	
	)	
PHOENIX INSTITUTE FOR RESEARCH AND EDUCATION, A NEVADA CORPORATION	)	**APPELLANT'S**
	)	**OPENING BRIEF**
Respondent	)	

# # #

IV

ARGUMENT

SUMMARY

THE ATTEMPT OF THE COURT TO PREVENT ITS PROCESSES FROM BEING MISUSED CAUSED THOSE VERY PROCESSES TO BE MISUSED. THE COURT PROCEEDED WITH AN INDISPENSABLE PARTY ABSENT. THE DISMISSAL OF GREEN'S CASE, BEFORE HE HAD PRESENTED IT, DEPRIVED THE COURT OF EVIDENCE THAT SHOWED THAT THE ORDER TURNING THE GOLD OVER TO DAVID OVERTON WAS TANTAMOUNT TO TURNING IT OVER TO THE EKKERS. THE RULING WAS THEN USED BY THE EKKERS TO PERPETUATE THE BILKING

OF INNOCENT PARTIES. THE RULING DEPRIVED GEORGE GREEN OF PROPERTY HE WAS ENTITLED TO, WITHOUT DUE PROCESS, AND LEFT HIM CONDEMNED AS A "SWINDLER" WITHOUT A HEARING AND WITHOUT THE EVIDENCE BEING HEARD THAT SHOWED HE WAS A VICTIM, NOT A CON MAN.

# # #

Supreme Court, U.S.
FILED
NOV 8 1996
CLERK

No. 96-353

In The

Supreme Court of the United States

October Term, 1996

GEORGE GREEN,

Petitioner,

vs.

PHOENIX INSTITUTE FOR RESEARCH AND EDUCATION, LTD., a Nevada Corporation,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Nevada

RESPONDENT'S BRIEF IN OPPOSITION

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9946
Lutz Appellate Services, inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21
BEST AVAILABLE COPY

LIST OF INTERESTED PARTIES

The names of all parties to the proceedings in the Court whose judgment is sought to be reviewed here appear in the caption of the case. There is no parent or subsidiary company of any party to be listed.

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Respondent requests that the Court deny the petition for writ of certiorari seeking review of an order of the Supreme Court of the State of Nevada.

STATEMENT OF JURISDICTION

This Court should not exercise jurisdiction over this case pursuant to 28 U.S.C. § 1257(a). All of the alleged federal questions were rendered moot by the decision of the Nevada Supreme Court on other grounds and there are no special or important reasons raised in the Petition.

STATEMENT OF THE CASE

Respondent respectfully opposes the petition for writ of certiorari which, in effect, is requesting that this Court allow Petitioner to keep the gold coins that he embezzled instead of returning them to their rightful owner. The statement of the case is succinctly and eloquently set forth in the Nevada Supreme Court's January 4, 1996 *per curiam* Order Dismissing Appeal, a copy of which has already been identified as pages 8-12 of Petitioner's petition for writ of certiorari filed herein on September 9, 1996. In particular, pages 8 and 9 of Petitioner's Appendix are most cogent. Petitioner embezzled the gold coins intended for Respondent by hiding some of the gold coins in his home and burying the remainder of the gold coins in his backyard. Incredulously, Petitioner claims that because the donor was awarded the gold coins, which comprised the intended gift, which was never consummated by delivery to Respondent because of Petitioner's embezzlement, the failed gift has been mistakenly ordered to be returned to its rightful owner. Thus, Petitioner faults the Nevada Supreme Court for not condoning the embezzlement perpetrated upon the donor by Petitioner as the constructive trustee of the embezzled gold coins.

Petitioner did testify at trial, and his testimony put the proverbial noose around his own neck, as will be seen below. Petitioner himself was heard at trial to admit that he was holding the gold coins as trustee, and not as its rightful owner.

A. Course of Proceedings and Disposition of the Case Below.

Petitioner's version of the statement of the case is inaccurate and misleading, because it fails to include pertinent information, information that was duly noted in the Nevada Supreme Court's Order Dismissing Appeal (Petitioner's Appendix 8-12). It should have been disclosed by Petitioner that Petitioner filed a counterclaim in May 1993 (2 ROA 384-388)[1] that was dismissed almost a year before trial (4 ROA 1280-1282). It should also have been disclosed that the donor and alleged missing indispensable party, David Overton, testified at trial, along with Petitioner, E. J. Ekker, the president of Respondent, and another witness, Leon Fort (11 ROA 1-130; 12 ROA 131-366). At trial Petitioner testified that he was trustee for the gold coins (12 ROA 132-238). Petitioner having admitted that he was the trustee for the intended gold gift which was intended by the donor to be given to another, could not undo by any stretch of the imagination the consequences of his embezzlement of the coins. Petitioner failed to disclose his receipt of the gold on behalf of Respondent and told no one about the gold (12 ROA 289-290). Further, Petitioner did not send a thank you letter, confirmation letter, or receipt to the donor (11 ROA 46; 12 ROA 145). Petitioner's own testimony at trial also included the following contradictory statements: (1) The gold was not delivered to the non-profit corporation (12 ROA 137); (2) The gift was incomplete (12 ROA 137-138); (3) Initially, Petitioner's

---

1. "ROA" refers to Record on Appeal including transcripts of proceedings (volumes 8-12), pleadings, other papers filed with the trial court (volumes 1-7), as set forth in the clerk's transcript dated December 9, 1994.

intention was to keep the gold and give it to a non-profit corporation when it was formed (12 ROA 137, 241); (4) Petitioner decided to keep the gold for himself (11 ROA 108; 12 ROA 139); (5) Petitioner held the gold as collateral (11 ROA 107-108; 12 ROA 200); (6) The gold was given to Petitioner and his wife, but primarily to Petitioner (11 ROA 108; 12 ROA 244; Exhibit 16); (7) Petitioner accepted the gold as a gift (11 ROA 109); and (8) Petitioner was a trustee for the gold coins, yet he never took an inventory of them (12 ROA 132, 139, 140, 238).

One of the more salient facts is the donor's testimony at trial emphasizing that the gold was never meant for Petitioner (11 ROA 41, 52). Such testimony was as follows: "I felt betrayed in my own mind because I intended those coins to be sent as a gift to the Institute, certainly not to Mr. George Green himself." (11 ROA 52).

Petitioner does correctly note that the federal questions were not raised until after the case was dismissed by the trial court.

B. Correction of Misstatements in the Petition.

The opinion of the Nevada Supreme Court in ordering dismissal of the appeal correctly sets forth **all** of the cogent facts of this case. The opinion accurately reflects the embezzlement by Petitioner, who had represented himself to the donor to be an officer and trustee of Respondent. Petitioner hid the gold coins from Respondent and never delivered them to Respondent as the intended donee. For the sake of brevity Respondent respectfully directs the Court's attention to page 1 of such Order Dismissing Appeal (Petitioner's Appendix 8) where it states:

> This is an appeal from an order of the district court dismissing respondent's complaint.

> During 1991, appellant George Green ("Green") received four shipments of gold coins from David Overton ("Overton") which were meant to be donated to respondent Phoenix Institute for Research and Education, a Nevada corporation ("Phoenix"). Overton donated the gold coins to Phoenix in order to assist Phoenix in publishing some of its publications, Green, representing himself to Overton as an officer or trustee of Phoenix, did not deliver the gold coins to Phoenix. Instead, after moving to Gardnerville, Nevada, Green hid some of the gold coins in his home and buried the remainder of the gold coins in his back yard.

These facts disclose the misrepresentations and half-truths set forth in paragraph 5 on page 4 of the Petition filed herein on September 9, 1996. Petitioner's statements falsely imply Petitioner was the intended donee and that Respondent was somehow aware of Petitioner's embezzlement of the gift. Petitioner also falsely implies that Respondent was aware of the embezzlement and allowed it to persist, only to seek such gift after Petitioner expended further funds. Pursuant to United States Supreme Court Rule 15.1, Respondent brings the foregoing to the Court's attention.

REASONS FOR DENYING THE WRIT

I.

PETITIONER HAS NEVER OWNED THE GOLD COINS HE EMBEZZLED.

The facts disclosed hereinabove, including Petitioner's own trial testimony, show that Petitioner has never owned the gold coins which he embezzled. This Court does not grant a certiorari to review evidence and discuss specific facts, *United States v. Johnston,* 268 U.S. 220, 227 (1925). Petitioner has never proffered any evidence or law that would show why as an embezzler he would be entitled to a hearing to retain the embezzled gold coins instead of returning them to the donor, David Overton. The Nevada Supreme Court upheld the trial court's decision based in part upon Petitioner's admissions in his trial testimony that a constructive trust was created upon state grounds in which Petitioner as constructive trustee held legal title for the donor and constructive trustor and beneficiary, *Locken v. Locken,* 98 Nev. 369, 372, 650 P.2d 803, 804-805 (1982). It also concluded that no hearing was necessary in order to return the property to the constructive trustor, *also citing Locken v. Locken* at page 372, 650 P.2d at 805 (Petitioner's Appendix, page 10).

II.

THE DONOR WAS NOT PREJUDICED BY FAILING TO APPEAR AS A PARTY.

The return of the gold coins to the nonparty donor was an equitable result. For reasons which remain unknown, Petitioner is claiming the rights of the donor were violated by returning the incompleted gold coins gift to him. Although the donor was

not a party, he did testify that Petitioner had betrayed him by failing to deliver the gold coins to Respondent. The only equitable thing to do was to return the gold coins to the donor, rather than allowing the embezzler to keep them. The Nevada Supreme Court so opined when it concluded on state grounds that the donor was not an indispensable party to this action. It cited *Howard v. Dallio*, 815 pl.2d 1150, 1152 (Mont. 1991), 7.6 Am. Jur. 2d *Trusts* § 215 (1992), and *Locken v. Locken, supra* 98 Nev. at 372, 650 P.2d at 805, again for the proposition that the construction of the constructive trust was necessary to prevent an inequitable result.

This Court has previously stated:

> The rule is that if the merits of the cause may be determined without prejudice to the rights of necessary parties, absent and beyond the jurisdiction of the court, it will be done; and a court of equity will strain hard to reach that result . . . [The] rule established by these authorities . . . illustrates the diligence with which courts of equity will seek a way to adjudicate the merits of a case in the absence of interested parties who cannot be brought in. Bourdier v. Pacific Western Oil Co., 57 S. Ct. 51, 53 299 U.S. 65, 70-71, 81 L. Ed 42 (1936).

Petitioner has failed to explain why with ample opportunity to do so he never brought the donor in as a party in a third party complaint. It is highly suspect that Petitioner, having embezzled the gold coins of the donor is now concerned about the unsubstantiated prejudice to the donor in not letting Petitioner keep the gold coins that he embezzled. The donor testified in person at the trial, but Petitioner's counsel never questioned him

about the prejudice to the donor on account of not appearing as a party, claimed by Petitioner for the first time after trial.

CONCLUSION

The writ of certiorari should be denied.

Respectfully submitted,

BRADLEY PAUL ELLEY
Counsel of Record
Attorney for Respondent
120 Country Club Drive
Suite 25
Incline Village, Nevada 89451
(702) 831-8800

(3)

Supreme Court, U.S.
FILED
NOV 18 1996
CLERK

No. 96-353

In The
SUPREME COURT OF THE UNITED STATES

October Term 1996

GEORGE GREEN

Petitioner

vs.

PHOENIX INSTITUTE FOR RESEARCH AND EDUCATION, LTD. A Nevada Corporation

Respondent

Petition for a Writ of Certiorari to the Supreme Court of the State of Nevada

PETITIONER'S REPLY MEMORANDUM

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No. 96-353

In The
SUPREME COURT OF THE UNITED STATES

October Term 1996

GEORGE GREEN

Petitioner

vs.

PHOENIX INSTITUTE FOR RESEARCH AND EDUCATION, LTD. A Nevada Corporation

Respondent

Petition for a Writ of Certiorari to the Supreme Court of the State of Nevada

PETITIONER'S REPLY MEMORANDUM

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PETITIONER'S REPLY MEMORANDUM

Respondent's Brief in Opposition (hereafter, Respondent's Brief, or RB) contains some 15 references to claimed "embezzlement" by Petitioner George Green, including the statement (RB 3), "The opinion accurately reflects the embezzlement by Petitioner." The Opinion of the Nevada Supreme Court is reprinted at App. 8-12 and contains no reference to embezzlement.

If permitted to be heard, Green would show that he paid over twice their value for the gold coins and used the funds to publish the very material the donor wished to support. The intent of the donor, Overton, at the time he shipped the four packages of coins was thus fully carried out.

ANSWER TO RESPONDENT'S "REASONS FOR DENYING THE WRIT"

The portion of the Respondent's Brief that relates to the issues for which certiorari is sought asserts two arguments and three authorities relied on by the Nevada Supreme Court.

WHETHER OR NOT GREEN OWNED THE COINS, HE WAS ENTITLED TO BE HEARD

Respondent's Brief misstates Green's position and overlooks the failure to the lower court to afford Green due process. The authorities cited in Respondent's Brief do not support the dismissal under the facts of this case.

Green's position is not that a hearing wasn't conducted, but rather that Green wasn't heard.

The District Judge refused to hear Green's explanation when he was called as an adverse witness (12 ROA 1951 ff.) and refused to hear him or any other witness called on his case in chief (App. 15,16).

Thus, the case was decided in an adversarial proceeding without one of the adversaries being heard.[1]

Locken v. Locken 98 Nev 369, 650 P2d 803 (cited RB 5,6) does not say that a

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[1] In fact, neither party to the theory adopted by the trial court was heard below--Green because he was not heard, though he appeared and tried to put on his case, and Overton, because he was never named as a party or claimant to the coins.

constructive trust will be imposed without the trustee/donee being heard. In Locken both the father and the son, the trustor and the trustee, were before the court and were heard. Overton (Trustor, under the theory inserted by the trial court) was not before the Court and Green (Trustee) was not heard. Locken is not support for denying Green his day in court.

Howard v. Dalio 815 P2d 1150, (Mont. 1991) (cited RB 6) is authority for fashioning a constructive trust for a non-party when the non-party is a joint owner, and the joint ownership was represented by another joint owner who was before the court. No joint ownership of the coins is involved in this case. Overton's claim (as asserted by the trial court) is entire. And it is he who was not before the court. None of the issues or defenses vis-a-vis Overton's claimed continued ownership, was ever pleaded or proven and Green was not heard with regard to such issues or defenses or with regard to any other issues or defenses.

In Howard v. Dalio, 815 P2d 1150 (Mont. 1991) (cited RB 6) the constructive trust was pleaded, both parties were heard, and both the person

claiming the constructive trust and the person upon whom it was imposed were before the court and were heard. In Green's case, no one had notice of the basis on which the case was decided (constructive trust). Green had no opportunity to be heard in regard thereto, and Overton was not before the court.

Howard v. Dalio is not authority for the imposition of a constructive trust where no owner claiming the constructive trust was before the court and where the person upon whom the constructive trust was imposed was not heard.

76 Am.Jur.2d Trusts sec. 215 (1992) (cited RB 6), in its concluding statement, says:

> "A court of equity. . .may not grant relief without regard to or examination of the conduct of plaintiff affecting the transaction from which the alleged unjust enrichment arose" (citing McGrath v. Hilding, 41 NY2d 625, 394 NYS2d 603, 363 NE2d 318).

No examination of the "plaintiff" (Overton) with regard to his conduct, nor inquiry into any claimed unjust

enrichment of George Green was conducted[2].

76 Am.Jur.2d Trusts Sec. 215 (RB 6) does not support the proposition that a party claiming gold coins[3] is not indispensable in a case where title to the coins is being determined, nor that such claimant may have a constructive trust imposed in his favor without the other claimant of the coins (Green) being heard.

In fact, the very next section, 76 Am.Jur.2d Trusts, Sec. 216, provides further basis for Green's position:

> "The rule (regarding the imposition of a constructive trust) does not, however, prevent a confidant or fiduciary from making a fair purchase

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[2] No examination of Overton was conducted because the basis for such examination didn't arise until after the trial court invented a new theory of the case, slammed the door of the court in Green's face, and Overton was on his way back to Texas (App. 1-3).

[3] Overton did not ask for the coins until after the lower court had imposed the constructive trust, refused to hear Green's case and (later) directed that Overton designate a recipient to accept the coins.

of the subject matter of the confidence or fiduciary relationship."

George Green was not heard on the question of whether he purchased the coins by fully discharging the purpose for which the coins were supplied. Green was not permitted to show that Overton's repeated requests to use the gold to "get the word out" (App 15-18)[4] were complied with and that he (Green) fully discharged any trust pursuant to which he might have been found to hold the coins.

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[4] The authorization from Overton to Green to use the gold in the way Green used it was repeated orally after Overton sent the gold to Green. Green was not permitted to testify to these statements which would have shown that Overton fully authorized and approved of the use to which his gold had been put.

Additionally, Appellee Phoenix's Exhibit 5, (admitted at 11 ROA 119/21) shows that Green had full authority to "purchase and sell assets . . .and/or precious metals . . .without limit as to amount." If it is contended that Green's disposition of the gold pursuant to the directions of Overton was inappropriate, he is nevertheless entitled to an examination of the question of whether he made a fair purchase that benefitted the donor and/or beneficiary by paying out over twice their value for the coins.

When Overton sent the gold, he sent it to the person who was paying the bills, to be spent on paying the bills. It is his intent at the time the gift was delivered, (and not his position after the purpose for which he supplied the coins was discharged) that determines whether he intended what he did -- send the gold to George Green. The fact that Overton was surprised that the coins existed (App. 18) (because Green sold his own assets on the security of the gold to raise the funds to pay the expenses of "getting the word out") does not show that Green breached any condition pursuant to which the gold was delivered to him. Rather, it shows that Overton knew that the expenses for which he supplied the gold were being met (App. 18). Green never had the opportunity to testify as to these matters or to question Overton about them in connection with any claim Overton might assert with regard to the gold.

No examination of the context of Green's statements was made since he was not heard. No explanation of the statements or the manner in which they fit together appears in the record to be examined, because the trial judge did not permit it.

"DONOR (OVERTON) WAS NOT PREJUDICED"

Whether this is true is immaterial. This Court (and the Ninth Circuit as well) has held that the lack of an indispensable party deprives the court of jurisdiction. Of course, Green's point is that he was prejudiced by having no notice or opportunity to be heard as to any theory of the case fashioned by the trial court when he t erminated the case half way through the proceedings.

Respondent's Brief does not answer the points and cases cited in the Opening Brief, pp. 8-24--due process requires (1) all parties to be before the court who are indispensable to the resolution of the case, and (2) all such parties must be heard.

CONCLUSION

There is plain error in the proceedings below in failing to hear Green's case and failing to require Overton to be before the court on any claim by him to the coins.

These errors are at variance with the holdings of the ninth and other circuits and this Court requiring due process be afforded before the deprivation of

property or a property right.

For these reasons the Writ of Certiorari should be granted.

Respectfully submitted this 15th day of November, 1996.

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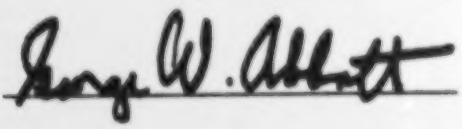
By 

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